

HEADNOTE

to the Order of the First Senate of 11 October 1978
1 BvR 16/72

Article 2(1) in conjunction with Article 1(1) of the Basic Law requires that a transsexual's male sex entry in the birth register be corrected, at least in cases where transsexualism is irreversible according to medical findings and gender reassignment surgery has been undergone.

FEDERAL CONSTITUTIONAL COURT - 1 BvR 16/72 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

H...,

– authorised representatives: ...

against the Order of the Federal Court of Justice of 21 September 1971
 - IV ZB 61/70 -

the Federal Constitutional Court – First Senate –
with the participation of Justices

President Benda,
Haager,
Böhmer,
Simon,
Faller,
Hesse,
Katzenstein,
Niemeyer

held on 11 October 1978:

The Order of the Federal Court of Justice of 21 September 1971 - IV ZB 61/70 - violates the complainant's fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law. It is reversed. The matter is remanded to the Federal Court of Justice.

[...]

REASONS:

The complainant is one of the persons who were assigned male at birth because of their visible sexual characteristics, but later felt they belonged to the female gender in every respect and – after adjusting their appearance – now live as women, but are legally treated as men (male transsexuals). With his constitutional complaint, he challenges the refusal to change his official sex entry in the birth register from ‘male’ to ‘female’.

A.

I.

On the basis of current findings, as set forth in a publication published by the German Society for Sexology (*Deutsche Gesellschaft für Sexualforschung*) from 1974, the key characteristic of transsexualism is the complete psychological identification with the other gender, i.e. the gender that contradicts that of one’s body. [...]

[...] 3-4

According to the scientific findings at hand, attempts to change the basic psychosexual structure of transsexuals by means of psychotherapy or hormone treatment have failed so far. According to scientific opinion, the only effective and helpful treatment is to adapt the transsexual’s body to the gender identity they experience as far as possible. Only this way can the danger of self-mutilation and suicide, to which transsexuals are always exposed, be averted. However, the medical experts argue that for a transsexual full recognition of the new gender role is only achieved when their first name and civil status are changed.

II.

Pursuant to § 1(2) of the Civil Status Act in the version officially published on 8 August 1957 (BGBl I, p. 1125), the registrar is responsible for keeping a birth register. In this respect, the law provides in its current version:

§ 21

(1) The following information is entered in the birth register: 7

1. - 2. (...)
3. the child’s sex
4. the child’s first and last name
5. (...)

(2) (...)

Entries may be amended or corrected by the registrar. 8

[...] 9-11

The registrar is also authorised to enter margin notes. 12

[...] 13

§ 47 14

(1) For the rest, a final entry may only be corrected by a court order. The same applies if a registrar has doubts as to whether they can correct an entry.

(2) (...)

III.

1. The complainant, who was born out of wedlock as the son of a seamstress, was raised first by foster parents, and later grew up in an orphanage in Silesia led by nuns. [...] 15

The complainant married in 1953. His marriage ended in divorce in 1964. In 1961, his wife had a baby. Following the complainant's action for annulment, a judgment was issued in 1965 declaring that it was not his legitimate child. From about 1960, serious disturbances to the complainant's general well-being became apparent, as he increasingly identified with the female gender. Already in 1962, his left testicle was removed because of a contusion. In 1963, his right testicle was removed as an undescended testicle. After having been treated with female sex hormones, the complainant underwent gender reassignment surgery at a German university hospital in 1964. 16

Today, the complainant works as a nurse at a university hospital. 17

2. In 1968, the Berlin-Schöneberg Local Court granted the complainant's request to officially recognise him as a woman under civil status law, and instructed the responsible registrar to correct the complainant's entry in the birth register with the following margin note: "The child designated here is female." The court order was based on several medical reports, each of which diagnosed the complainant with an irreversible case of transsexualism. It also pointed out that a refusal to change the civil status could lead to unpredictable contradictions and interpersonal and social difficulties for the complainant. 18

3. Following the complaint of the *Land* Minister of the Interior, the Regional Court reversed the Local Court's order and rejected the application for correction of the entry in the birth register. [...] 19

4. The complainant immediately filed a further complaint against this decision. The Higher Regional Court referred this complaint to the Federal Court of Justice for decision: 20

The Higher Regional Court argued that assigning the male sex was correct at the time of the entry. However, according to the court, it should now be considered established medical fact that gender is not determined by the sexual organs and characteristics alone, but also by the human psyche. [...] 21

[...] 22-23

5. The Federal Court of Justice did not concur with the Higher Regional Court and rejected the immediate further complaint [...]. According to the court, certain basic experiences have been taken for granted so far when assigning persons to the respective sex categories. The court held that in addition to the finding that there are no sexless persons, but that all persons can be assigned to the alternative categories of 'male' and 'female', there is the experience that a person's sex may be and must be determined based on physical sexual characteristics, which are innate and unchangeable. This principle not only governs all of social life, but the entire legal order. Occasional difficulties when assigning hermaphrodites to a sex cannot be considered a disruption of these principles. 24

The court held that this was not a failure to recognise that a transsexual who by fate has an irresistible urge to convert to the other gender may have a recognisable need to also be officially assigned to this sex. It held, however, that this was not possible without the corresponding legal provisions. [...] 25

IV.

1. The treatment of transsexuals under civil status law has repeatedly been debated in the German *Bundestag*. [...] A draft "Act on Changing Officially Assigned Sex in Certain Cases" [...] provides for a 'small' and a 'big' solution. According to this draft, transsexuals of legal age who are unable to reproduce and have felt compelled to belong to the other gender for at least three years may assume a first name corresponding to this gender, if their identification with the other gender is highly likely to no longer change. [...] 26

2. In order to at least somewhat accommodate the difficult situation of transsexuals even before legislation is put in place, and in order to avoid causing undue hardship, the *Länder* and the Federation have agreed that transsexuals may assume a so-called gender-neutral first name [...] in addition to the first name they have had so far. This new first name may then be stated on their identity card as their only first name without any additional gender markers. Accordingly, the complainant's male first name was changed to Helge. 27

V.

With his constitutional complaint, the complainant claims a violation of Art. 1(1) and (3) and of Art. 2(1) of the Basic Law. [...] 28

VI.

1. The Federal Minister of Justice considers the constitutional complaint to be admissible, but unfounded. [...] 29

[...] 30

2. The President of the Federal Administrative Court stated that the court merely decided that a person who could be considered as transsexual may not have a female first name as long as they have a male sex entry in the birth register. [...] 31

B.

The constitutional complaint is well-founded. 32

The challenged decision violates the complainant's fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 33

I.

1. According to the medical reports submitted, the complainant is female in psychological terms and his physical appearance was adapted to this gender as far as medically possible by way of hormone treatment and surgery. Legally, however, the complainant is treated as a man against his will. He is thus denied the opportunity of leading an ordinary and assimilated life as a woman. The inconsistency between appearance and civil status is illustrated by the simple fact that he cannot legally have a female first name. Given that the Civil Status Act clearly assumes that the first name must indicate the sex of the name bearer [...], the complainant can only change his name once the sex entry in the birth register has been changed. In this respect, even a gender-neutral first name does not entirely rule out contradictions for the complainant. The sphere affected by these belongs to the most intimate part of personality, which is in principle beyond the reach of the state and where in any case interference is only permissible if special public interests exist (cf. BVerfGE 47, 46 <73>). 34

2. a) Art. 1(1) of the Basic Law protects human dignity, the way persons understand themselves as individuals and become aware of themselves. This includes the right to determine one's own being and to take one's destiny into one's own hands. Art. 2(1) in conjunction with Art. 1(1) of the Basic Law guarantees the free development of the abilities and strengths inherent in a human being. Therefore, human dignity and the fundamental right to the free development of one's personality require assigning persons the civil status of the gender they identify with on the basis of their psychological and physical constitution. In this context, our legal order and our social life are based on the precept that humans are either male or female, independent of possible anomalies in the genital area. However, it is doubtful whether the hypothesis of an unchangeable identity based on sex, as determined at birth by way of external sexual characteristics, is still tenable in the absolute terms described by the Federal Court of Justice in its challenged decision. Science shows that there are various forms of somatic intersexuality. Based on studies on hermaphrodites, medical research has also pointed out that dissociation between body and psyche may occur, which is particularly pronounced in transsexuals according to established scientific findings. 35

The "basic experience" that a person's gender is determined by their physical sexual characteristics, and that it is innate and unchangeable, is seriously challenged by the medical findings concerning psychosexual development as the product of hereditary and external environmental factors [...]. In any case, irrespective of remaining doubts as to the origins and causes of transsexualism, the transsexual complainant does not identify as a man, and according to the submitted medical reports, there are no external 36

indications of male sex. In addition, his social behaviour is adapted to that of a woman, as his work as a nurse also indicates.

b) However, the right to the free development of one's personality is only guaranteed within the limits of moral law. Yet moral law is not violated in the case at hand. It is not within the scope of the current proceedings to decide whether gender reassignment surgery that is not required from a medical perspective would be contrary to moral law. According to the medical reports submitted here, surgery was medically indicated. Based on established scientific findings, transsexuals do not seek to manipulate their gender. Their focus is not sexuality, but rather achieving an alignment of body and psyche, and thus surgery must be considered necessary for realising this goal. The suffering of transsexuals described in the medical literature is strikingly confirmed by the medical reports regarding the complainant. Based on these reports, the complainant's process of gender change cannot be considered immoral. In the order challenged by the constitutional complaint, the Federal Court of Justice also denied the immorality of genital corrective surgery that aims to avoid severe psychological and physical damage. 37

The fact that the complainant, as a result of the correction of the complainant's sex entry, is able to marry a person of his former sex is not contrary to moral law either. 38

No further consideration is needed regarding the fact that a man's reproductive capacity and a woman's ability to give birth are not a precondition for marriage. Under the Basic Law (Art. 6(1) of the Basic Law) marriage is the union of a man and a woman in a partnership that is in principle inseparable (BVerfGE 10, 59 <66>). It is up to the spouses to shape this partnership according to their wishes. [...] 39

c) According to the case-law of the Federal Constitutional Court, restrictions to an individual's exclusive right to determine their domain of private life may follow from their co-existence with others, insofar as this domain does not belong to their inviolable innermost domain (BVerfGE 35, 202 <220>; with further references). Yet in the complainant's case, no public interest in refusing to change his sex entry in the birth register is apparent which might justify an interference with the fundamental right of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 40

II.

Since the refusal to correct the sex entry in the birth register is therefore incompatible with Art. 2(1) in conjunction with Art 1(1) of the Basic Law, the obligation of the courts to act in a manner compatible with fundamental rights cannot be denied merely because a legal provision is lacking. 41

1. [...] Of course, the legislator is free [...] to create a legal basis for correcting transsexuals' sex entries in the birth register. However, as long as it has not specified the requirements for such a correction, the obligation that follows directly from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law can be met by means of an interpretation of § 47(1) of the Civil Status Act in conformity with the Constitution. 42

2. [...] 43

a) It is true that case-law and legal scholarship have developed the view that § 47(1) of the Civil Status Act only allows for the correction of entries in the birth register that were false from the outset. [...] The Federal Court of Justice concurred with this view in the challenged decision. 44

b) However, the term ‘correction’ does not necessarily require information to have been false originally. It may also refer more generally to the subsequent rectification of incorrect information. [...] 45

As far as the legislator’s intent is concerned, it must be taken into account that § 47(1) of the Civil Status Act [...] not only [...] does not preclude corrections to transsexuals’ sex entries, but also stipulates the procedural conditions for making such corrections. 46

3. The Federal Court of Justice is of the opinion that the legal problems associated with gender reassignment cannot be solved by way of judicial development of the law. This view fails to recognise that while there may be a legal gap in this respect, this gap cannot be considered a general lack of legal regulation in light of the constitutional law described above, according to which the fundamental right of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law directly results in an obligation upon the courts. In the interest of legal certainty, it is indeed for the legislator to resolve the civil status issues arising from gender reassignment and its consequences. However, as long as such legislation is not in place, the task incumbent upon the courts is the same as it was in the case of equality between men and women before the Equal Rights Act entered into force (BVerfGE 3, 225 <239 *et seq.*>, cf. also BVerfGE 37, 67 <81>). The courts cannot be denied this responsibility, given that the judiciary is directly bound by the fundamental rights (Art. 1(3) of the Basic Law). 47

Moreover, the complainant’s case does not raise most of the legal problems which, according to the Federal Court of Justice, can only be solved by the legislator itself. The complainant is divorced, does not have any children, underwent gender reassignment surgery as early as 1964, and is 46 years old. Insofar as it is necessary to determine the time at which gender reassignment attains legal validity, the view that entries in the birth register are merely declaratory does not have to be upheld given the applicable constitutional law. For instance, a solution that is not objectionable under constitutional law would be giving *ex nunc*, and thus constitutive effect, to the margin note of a change of a person’s sex entry after birth. 48

However, it is not for the Federal Constitutional Court to decide on this matter. Therefore, the matter is remanded to the Federal Court of Justice. 49

Benda Haager Böhmer
Simon Faller Hesse
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